Supreme Court, U.S.
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In The

Supreme Court of the United States

HORACE ANDREW DAVIS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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59 pp

QUESTION PRESENTED

Whether the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, may constitutionally be applied to purely intrastate personal use or personal manufacturing drug crimes where petitioner's conduct had no substantial relation to interstate commerce and there is no interstate commerce element for the crime.

LIST OF PARTIES

All the parties to this case are listed on the cover in the style of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Horace Andrew Davis, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming petitioner's conviction is reported at *United States v. Davis*, 288 F.3d 359 (8th Cir. 2002). (App. A, *infra*, at 3a-7a)

JURISDICTION

The Court of Appeals decided this case on May 3, 2002. (App. A, *infra*, at 3a)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) involving the petition of a party in a criminal case. The trial court asserted jurisdiction under 21 U.S.C. §§ 841(a)(1) & 846 and 18 U.S.C. § 924(c)(1)(A). (App. C, *infra*, at 12a-13a (indictment); *see also* App. B, *infra*, at 8a-10a (order denying motion to dismiss))

CONSTITUTIONAL PROVISIONS INVOLVED

Art. I, § 8, cl. 3 & 18 of the U.S. Constitution provides as follows:

> The Congress shall have the Power . . . ;
>
> [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

. . .

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 801, the Congressional "findings and declarations" for the Controlled Substances Act appears in App.D at 14a-15a. Subsections 2-6 appears in the text, *infra,* at 15-16.

21 U.S.C. § 802 provides, in pertinent part, as follows:

Definitions:

. . .

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. . . .

21 U.S.C. § 841(a)(1) provides as follows:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or

possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. § 844 provides as follows:

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. . . .

21 U.S.C. § 846 provides as follows:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

A. Petitioner was arrested on May 3, 1999 by Pine Bluff and Jefferson County police officers for operating a small methamphetamine lab in and around a camper trailer on rural land in Jefferson County, Arkansas.

Petitioner was originally sought on a felony warrant from a domestic dispute with his ex-wife. Execution of that arrest warrant led to his arrest for operation of the methamphetamine lab. Officers obtained a search warrant from the Pine Bluff Municipal Judge and returned for more evidence. Petitioner was charged in Jefferson County Circuit Court for these same offenses under Arkansas law.

Before petitioner's case came to trial, he was arrested

twice more by Pine Bluff and Jefferson County police for doing the same thing: similar methamphetamine and marijuana offenses on March 25, 2000 and methamphetamine and firearms possession offenses on October 1, 2000. In each case, he was charged in state court.

B. The federal government indicted petitioner for these same offenses on November 8, 2000.[1]

Offense	*State v. Davis*		*U.S. v. Davis*	
	Count	Ark.Code	Count	U.S.C.
manufacturing meth.	1	5-64-401	1	21:841(a)(1)
possession of meth.	2	5-64-401	3	21:844(a)
possession of marijuana	3	5-64-401	4	21:844(a)
poss. of gun during drug crime	4	5-76-104	2	18:924(c)(1)

State of Arkansas v. Davis, Jefferson Cir. No. CR99-394-2 (filed May 5, 1999); *United States v. Davis,* No. 4:00CR 00240 (E.D.Ark., filed Nov. 8, 2000) (App.D, at 14a-15a).

The State then nolle prossed the all the charges against petitioner on November 22, 2000.

On May 10, 2001, petitioner filed a motion to dismiss the indictment on the ground that his conduct had no substantial relation to interstate commerce and did not allege an interstate commerce element in violation of U.S. Const., Art. I, § 8, cl. 3.

On June 19, 2001, the District Court told the parties that

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[1] Counts 1-4 involved May 3, 1999, Counts 5-7 involved May 25, 2000, and Counts 8-11 involved October 1, 2000. Only Counts 1-4 are reproduced in App. C, at 12a-13a. Count 4 (misdemeanor possession of marijuana) was also dismissed by the government on the conditional plea.

the motion was denied with a written order to follow, and petitioner then entered a conditional plea of guilty to Counts 1-3 of the indictment, reserving this issue for appeal. The government moved to dismiss Counts 4-11 on acceptance of the plea. The District Court denied the motion in writing on June 26, 2001. (App.B, at 8a-11a)

Petitioner was sentenced to 78 months imprisonment on Count 1 (manufacture of methamphetamine), 12 months concurrent on Count 2 (possession of methamphetamine), and 60 months consecutive on Count 3 (possession of a firearm during a drug crime), for a total of 11½ years. He also has three years of supervised release upon his release from prison.

C. The Eighth Circuit Court of Appeals affirmed petitioner's conviction on May 3, 2002. *United States v. Davis,* 288 F.3d 359 (8th Cir. 2002). (App.A at 3a-7a) The Court of Appeals rejected petitioner's Commerce Clause arguments, finding that Congress's findings (21 U.S.C. § 801, *see* App.D) were sufficient:

> We rejected a similar argument in *United States v. Patterson,* 140 F.3d 767, 772 (8th Cir. 1998), where we held that Congress may regulate both intrastate and interstate drug trafficking under its commerce clause powers because of the effect that intrastate drug activity has upon interstate commerce. The findings which Congress made in enacting the Controlled Substances Act, 21 U.S.C. § 801(2)-(6), demonstrate that local manufacture and distribution of controlled substances substantially affect interstate traffic in those substances, *United States v. Bell,* 90 F.3d 318, 321 (8th Cir. 1996). Unlike the statute at issue in *Lopez* which lacked such findings, 514 U.S. at 562, the Controlled Substances Act is a valid exercise of Congressional power under the commerce clause. *Patterson,* 140 F.3d at 772. Ev-

ery other circuit to address the constitutional issue is in agreement. *See United States v. Brown,* 276 F.3d 211, 215 (6th Cir. 2002) (citing the cases).

(App.A at 5a-6a)

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER CONGRESS EXCEEDED ITS AUTHORITY UNDER THE COMMERCE CLAUSE IN ADOPTING THE CONTROLLED SUBSTANCES ACT WITHOUT REQUIRING ANY INTERSTATE COMMERCE CONNECTION OR ELEMENT FOR A FEDERAL DRUG CRIME.

A. Introduction

This case involves federalization of a quintessentially local drug crime, that was hurting no one other than petitioner and his cohort. It cuts deeper than one normally expects because methamphetamine and marijuana can be locally manufactured and consumed without ever coming close to crossing a state line, being sold or given away, or "substantially affect[ing] interstate commerce. *United States v. Lopez,* 514 U.S. 549, 559 (1995).[2] It is a case involving respect for "the

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[2] Cocaine and heroin come from overseas. Methamphetamine and marijuana can come from international or interstate sources, but they can also be locally made or grown and never leave the source state before consumption. *Oakland Cannabis Buyers' Cooperative, infra,* involved locally grown cannabis for medicinal use in Oakland, California. *Id.,* Resp.Br. at 39 (2001 WL 173541):

> The government does not dispute that Respondents provided cannabis grown entirely in California, by California cultivators, and distributed wholly within California, by only California residents, exclusively to California patients, who had recommendations or approvals issued solely by California licensed physicians, for use only within California.

How medical cannabis use has an interstate commerce affect was not shown by the government in *OCBC.*

constitutional role of States as sovereign entities"; *Alden v. Maine,* 527 U.S. 706, 713 (1999); to prosecute their own crimes under the Tenth Amendment[3] because the CSA does not preempt state law. 21 U.S.C. § 903.

Petitioner submits that, in prosecuting this crime, the federal government exceeded its power under the Commerce Clause, Art. I, § 8, cl. 3 of the U.S. Constitution. To para-

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[3] *Printz v. United States,* 521 U.S. 898, 918 (1997):

> It is incontestible that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991); *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," THE FEDERALIST No. 39, at 245 (J. Madison). . . Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (footnote added)

JAMES MADISON, THE FEDERALIST No. 39, *supra:*

> In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres of authority, than the general authority is subject to them within its own sphere. In this relation then, the proposed government cannot be deemed a NATIONAL one; since its jurisdiction extends to certain enumerated powers only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.

phase using *Lopez*:

> [t]he possession of a [methamphetamine] [o]n [ ] local [farm land] is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local [manufacturer for himself] at a local [farm]; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the [methamphetamine] have any concrete tie to interstate commerce.

Lopez, 514 U.S. at 567, quoted *infra* at 22-23 (bracketed material added).

This is an issue of first impression for this Court, and it was seemingly reserved in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 495 n. 7 (2001) (*OCBC*).[4]

B. Possession and manufacture of methamphetamine is a crime in every state; but not some marijuana offenses

Every state prosecutes drug crimes, and manufacturing and possession of methamphetamine is a crime everywhere in the country. Seven states and the District of Columbia have

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[4] *Id.* at 495 n. 7: "Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause."

The Buyers' Cooperative defended the decision below on the ground that the CSA was unconstitutional as applied to the purely intrastate activity of medical use of cannabis authorized by state law. *Id.*, Resp.Br. at 39-40; *see* note 2, *supra*.

There is no conflict in the circuits. Petitioner knows of no case holding the CSA unconstitutional as applied to this type of drug crime or for not requiring an interstate commerce element in the government's proof.

legalized medicinal use of cannabis. *Id.*, 532 US. at 499-502 & nn. 3-4 (STEVENS, J., concurring with SOUTER and GINSBURG, JJ.).

Sometimes this leads to serious federal-state friction when the federal government decides to prosecute or interfere with what is legal under state law. There are three examples which lead to a fourth potential example:

1. *OCBC* related medical cannabis litigation. The federal government is in a "tug of war" with California officials over its using the CSA to enforce federal marijuana laws against legally authorized California distributors of medicinal cannabis ever since *Oakland Cannabis Buyers' Club.*[5] Whether action will be taken in the other states legalizing medical cannabis remains to be seen.

2. Physician Assisted Suicide: There is also serious friction developing from the federal government's efforts to use the CSA to override Oregon's physician-assisted suicide initiative; Or.Rev.Stat. §§ 127.800–127.897 (Death with Dignity Law). *Oregon v. Ashcroft,* 192 F.Supp.2d 1077 (D.Or. 2002) (order issued April 17, 2002, enjoining Attorney General from with interfering with state authority). Newspaper and magazine articles excoriated the Attorney General for this allocation of prosecutorial resources to threaten the prosecution of doctors for performing a procedure sanctioned by Oregon's voters when the government should be prosecuting true federal crimes and terrorists.[6]

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[5] AP, "DEA raids Santa Rosa medical marijuana club," May 30, 2002 (¶ 1). *See, e.g, id.,* Bob Egelko, "Medical pot clubs dealt a second blow; Judge backs federal effort to close them," San Francisco Chronicle (May 4, 2002).

[6] *See, e.g.,* Jonathan H. Adler, "Death and Federalism," *National Review* (Dec. 6, 2001); Editorial, "Ashcroft's misguided obsession; as the country battles terrorism, he targets Oregon's suicide law," *Pittsburgh Post-Gazette* (Nov. 28, 2001) A21; Susan Nielsen, "Living a good death–forget about assisted suicide; other

3. Decriminalization of small amounts of marijuana: Twelve states have also decriminalized possession of small amounts of marijuana.[7] In 1990, the federal Drug Czar actively campaigned in the initiative drive to "recriminalize" marijuana in Alaska,[8] which passed.[9] Alaska's Constitution (Art. I, § 22) protects possession in the home of less than ½ pound of marijuana by adults,[10] even after the passage of the 1990 initiative.[11] What happens when the federal government

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end-of-life issues complicate the dying process even more than the 'right to die,'" *Sunday Oregonian* (Dec. 2, 2001) B1 (Attorney General Ashcroft as Senator sought to block Oregon's law after the voters reapproved of it in 1997 but he could not muster sufficient votes to do anything); Editorial, "Ashcroft power play to try to stop assisted suicide in Oregon tramples on states' rights," *San Jose Mercury News* (Nov. 19, 2001), reprinted by *Knight Ridder/Tribune News Service* (Nov. 21, 2001); Ellen Goodman, "Ashcroft terrorizes the terminally ill," *The Baltimore Sun* (Nov. 18, 2001) 3F.

See Steve Chapman, "The drug war vs. the war on terror," *Chicago Tribune* (Dec. 13, 2001) 31 ("A Boston TV station reported that a few years ago, the FBI squeezed one local Al Qaeda member for information about heroin smuggling, but showing a conspicuous lack of interest in what he told them about Arab terrorists.").

[7] Decriminalization states are: Alaska, California, Colorado, Maine, Minnesota, Mississippi, Nebraska, Nevada, New York, North Carolina, Ohio, and Oregon.

[8] Jeff Berliner, "Bennett stumps Alaska to outlaw legal marijuana," UPI (Oct. 26, 1990); "New bid to ban pot in Alaska; Drug Czar flying up to help campaign against marijuana," *Seattle Post-Intelligencer* (Oct. 25, 1990) A3.

[9] The initiative passed is Alaska Stat. § 11.71.060 which criminalizes possession of ½ pound or less, which was already a crime in Alaska.

[10] *Ravin v. State,* 537 P.2d 494 (Alaska 1974).

[11] *Walker v. State,* 991 P.2d 799 (Alaska 1999).

decides to prosecute cases that the local government or voters have decided should be legal? So much for the Tenth Amendment and the balance between the federal government and the states that James Madison so eloquently articulated. *See* note 3, *supra*.

4. Silver platter: And, finally, as here, it sometimes takes the form of a "silver platter," where the state officials hand over a state drug case to the federal government for prosecution. This is not so much friction as it is an abdication of authority by the State or a usurpation of state authority by the federal government of powers reserved to the States under the Tenth Amendment. It is readily apparent that when a state officer has violated state law in conducting a search or making an arrest, the officer's conduct would be legal under federal law.[12]

C. "States possess primary authority for defining and enforcing the criminal law"; the constitutional basis for federal crimes

> Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson,* 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac,* 456 U.S. 107, 128 (1982)); see also *Screws v. United States,* 325 U.S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated

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[12] *See, e.g, United States v. Appelquist,* 145 F.3d 976 (8th Cir. 1998) (fact search violated state law on nighttime searches not a violation of the Fourth Amendment or F.R.Crim.P. 41; case was nolle prossed in state court on filing of suppression motion, and federal government picked up the case).

> powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Enmons,* 410 U.S. 396, 411-412 (1973) (quoting *United States v. Bass,* 404 U.S. 336, 349 (1971)).

Lopez, 514 U.S. at 561 n. 3.

The authority for Congress to make an act a federal crime has to be found in the Constitution. In this case, it would have to be found in the Commerce and "Necessary and Proper" Clauses. U.S. Const., Art. I, § 8, cl. 3 & 18 provide:

> The Congress shall have Power . . . .
>
> . . .
>
> To regulate Commerce with foreign Nations, and among the several States . . .
>
> . . .
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Otherwise, power is reserved to the people and the states under the Ninth and Tenth Amendments, respectively.

D. Federal drug laws before the Controlled Substances Act

The Controlled Substances Act was adopted in 1970. A very brief history may be helpful because history shows that the interstate commerce requirement of federal drug laws was an element of the crime to be proved by the government beyond a reasonable doubt until adoption of the CSA.

The first federal drug laws made opium smuggling a crime. Narcotic Drug Import and Export Act, 35 Stat. 614, ch. 100 (Feb. 9, 1909), amended by 38 Stat. 275, ch. 9 & 277 c. 10 (Jan. 17, 1914); 21 U.S.C. § 174 (repealed).[13] The constitutionality of that Act was upheld under the Commerce Clause in *Brolan v. United States,* 236 U.S. 216, 218-29 (1915) (finding frivolous the argument that Congress could not legislate against smuggling opium). Marijuana smuggling became illegal with Treasury Decision 35719 (Sept. 15, 1915). Cocaine was added to the Narcotic Drug Import and Export Act in 1922. 42 Stat. 596, ch. 202 (May 25, 1922); 21 U.S.C. § 174(b,c) (repealed).

In 1951, possession of a drug knowing it was unlawfully imported became a crime, with the defendant was required to prove to the jury the lawfulness of his possession. 65 Stat. 767, ch. 666 (Nov. 2, 1951); 21 U.S.C. § 174(c) (repealed). A presumption of smuggling was created in 1956 which the defendant could rebut. 70 Stat. 571, ch. 629, title I, § 105 (July 18, 1956); 21 U.S.C. § 174(i) (repealed). Marijuana possession was then taxed by the IRS. *Id.* § 101; 26 U.S.C. 4741 *et seq.* (repealed); *see Leary v. United States,* 395 U.S. 6 (1969); *Minor v. United States,* 396 U.S. 87 (1969).

The inference of smuggling on mere possession of an imported drug was upheld by the Court in *Yee Hem v. United States,* 268 U.S. 178 (1925), *Casey v. United States,* 276 U.S. 413 (1928), and *Roviaro v. United States,* 353 U.S. 53 (1957), but the Court still required that the government prove smuggling or knowledge of smuggling beyond a reasonable doubt, even with the inference. *Harris v. United States,* 359 U.S. 19, 23 (1959); *Turner v. United States,* 396 U.S. 398 (1970).

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[13] *Cf. In re Missouri Pac. R. Co.,* 7 F.Supp. 1, 9 (E.D.Mo. 1934) (opium smuggling a crime since 1903).

E. The findings in the federal Controlled Substances Act; 21 U.S.C. § 801(2-6)

When Congress adopted the Controlled Substances Act (CSA) in 1970, it stated the following as its "findings and declarations," Pub.L. 91-513, § 101, 21 U.S.C. § 801:

> The Congress makes the following findings and declarations:
>
> . . .
>
> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
>
> (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—
>
> (A) after manufacture, many controlled substances are transported in interstate commerce,
>
> (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
>
> (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
>
> (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
>
> (5) Controlled substances manufactured and

> distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
>
> (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

This is merely stated as fact—nothing petitioner could find in the testimony given prior to the adoption of the CSA supports these conclusions. It appears to be written to fit the *Wickard* test, but petitioner submits that it fails (*see* G.2.c., *infra*).

F. Methamphetamine labs in general and in Arkansas

Prior to 1994, quality methamphetamine was imported from Mexico. Starting in 1994, it was also manufactured in the United States. (High quality methamphetamine is still imported.[14]) "Mexican-based" groups made it in Mexico and Southern California with expertise derived from earlier production and easily obtained chemicals from Mexico and im-

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[14] Petitioner's counsel had a case in the Western District of Arkansas involving a highway stop that led to a seizure of 411 gm. (about 14 oz.) of Mexican methamphetamine being delivered to Knoxville, Tennessee. The sentence was enhanced for the defendant's relevant conduct involving his admission to several importations on his person through the San Ysidro, CA–Tijuana, MX border crossing. *United States v. Linkous*, 283 F.3d 716, 719 (8th Cir. 2002). This issue was not raised there because the interstate commerce element was apparent.

ported from elsewhere.[15] These "Mexican-based" groups often operated what the DEA calls "super labs" capable of producing 10 pounds of meth every day. They produce 70-90% of the methamphetamine sold in the United States, at twice the purity of home grown methamphetamine, but were involved in only *2.98%* (204 of 6,835) lab seizures nationwide in 1999.[16]

Then, there is the proliferation of homemade methamphetamine for personal use—the type of lab linked to petitioner. Small scale users comprised the overwhelming majority of 1999's methamphetamine lab seizures (97.02%). And, small labs are different than the "super labs" in their law enforcement response.[17] One may suspect that homemade methamphetamine will be sold or exchanged, but that does not always follow with the small labs, and this case shows it.

> Although the quantities of production were insignificant in comparison to California methamphetamine laboratory production, it is noted that in terms of numbers only–more clandestine laboratories were seized in Nevada, Utah, Missouri, Iowa, Arkansas, Kansas, Oklahoma, and Oregon in CY-2000 (*per capita*) than were seized in California. However, these labs were generally very small (*ounce production capability*) operations, and it is estimated that the combined production capabilities of all nine of these states would be less than the production of the

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[15] DEA Congressional Testimony, testimony of Joseph D. Keefe, Chief of Operations, DEA, before the House Committee on Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources (July 12, 2001). http://www.dea.gov/pubs/cngrtest/ct071201.htm.

[16] *Id.*

[17] *Id.* (a small lab would have a lower risk of explosion or toxic waste).

California "super lab" seizures.[18]

Homemade methamphetamine lab operators can go to their local Wal-Mart and drug store to get most of the ingredients and equipment for a methamphetamine lab.[19] Arkansas is the per capita leader in small methamphetamine labs.[20]

Indeed, neither the DEA nor the FBI investigate small local labs—local and state officers do, as they should. The federal government, however, willingly adopts the cases made by state and local officers to "make a federal case out of it," as happened here. Apparently the only limit are the choices made in the allocation of resources by the various U.S. Attorney's Offices in whether they should assume a case, but their decisions affect the resources of the U.S. Courts[21] and the Bu

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[18] *Id.* (emphasis in original).

[19] *Id.*:

> Methamphetamine is, in fact, a very simple drug to produce. A user can go to retail stores and easily purchase the vast majority of the ingredients necessary to manufacture the drug. Items such as rock salt, battery acid, red phosphorous road flares, pool acid, and iodine crystals can be utilized to substitute for some of the necessary chemicals. Precursor chemicals such as pseudoephedrine can be extracted from common, over-the-counter cold medications. A clandestine lab operator can utilize relatively common items such as mason jars, coffee filters, hot plates, pressure cookers, pillowcases, plastic tubing, gas cans, etc., to substitute for sophisticated laboratory equipment. Unlike Fentanyl, LSD, or other types of dangerous drugs, it does not take a college-educated chemist to produce methamphetamine.

[20] Chris Branham, "Arkansas passed over for drug-fighting funds," *Arkansas Democrat-Gazette* (Jan. 6, 2001) B1.

[21] "Criminal filings since 1992 have increased 30%." 2001

reau of Prisons.[22] Some U.S. Attorneys have acted on arbitrary grounds such as prosecuting in federal court all street dealers arrested on, this week, let's say . . . , a Wednesday.[23]

Without jurisdictional limits, there is no prohibition against a federal prosecutor prosecuting any small or state drug crime he or she chooses, investing the resources of the U.S. Attorney, U.S. Courts, U.S. Marshal, and U.S. Bureau of Prisons, but not the DEA or FBI because they were never involved in the case to begin with.

G. There must be a rational basis for Congress's conclusion there is a "substantial relation" to interstate commerce for the federal government to declare an act a crime.

1. "Substantial relation" in *Lopez*

In *United States v. Lopez, supra,* this Court dealt with the federal Gun-Free School Zones Act, and it held that the Act violated the authority granted to Congress under the Commerce Clause. Forty states already prosecuted the same conduct. *Id.* at 581-82 (KENNEDY, J., dissenting).

The Court noted three classes of interstate commerce cases: (1) regulating the use of channels of interstate commerce; (2) protecting the instrumentalities of interstate commerce, even though the threat is from intrastate activities; and (3) "Congress' commerce authority includes the power to regulate

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Year-end Report on the Federal Judiciary, note 3. http://www.supremecourtus.gov/publicinfo/year-end/2001year-endreport.html #foot3.

[22] 55.1% of all federal inmates are serving time for drug crimes. www.bop.gov, Quick Facts, Types of Offenses (Jan. 1, 2002).

[23] *See* Alexander Stille, "A Dynamic Prosecutor Captures the Headlines," *Nat'l L.J.* (June 17, 1985) 48.

those activities having a substantial relation to interstate commerce . . . , *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59.[24]

Operating a small methamphetamine lab in rural Jefferson County, Arkansas, for all we know for the personal use of the operators, where no sale or delivery will occur *anywhere* is simply not an activity that has anything to do with interstate commerce. Just as the Gun-Free School Zone Act, 21 U.S.C. § 841

> is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. [The] Section [ ] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.
>
> Second, [the section] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the . . . possession in question affects interstate commerce. For example, in *United States v. Bass,* 404 U.S. 336 (1971), the Court interpreted former 18 U.S.C. § 1202(a), which made it a crime

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[24] As in *Lopez,* the first two factors are inapplicable to this case: It is not a regulation of the use of channels of interstate commerce, nor is it a prohibition of transportation of these drugs in interstate commerce.

Petitioner does not dispute the power of the federal government to prohibit the importation; 21 U.S.C. §§ 952 & 960; or interstate movement of drugs as was involved in *Linkous*. This case involves neither.

> for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm." 404 U.S., at 337. The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.*, at 349. The *Bass* Court set aside the conviction because, although the Government had demonstrated that Bass had possessed a firearm, it had failed "to show the requisite nexus with interstate commerce." *Id.*, at 347. The Court thus interpreted the statute to reserve the constitutional question whether Congress could regulate, without more, the "mere possession" of firearms. *See id.*, at 339, n. 4; . . . . Unlike the statute in *Bass*, [the statute involved] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Id. at 560-61 (bracketed material added; footnote and citation omitted).

2. What is the effect on interstate commerce?

This is manifestly not "economic activity." The findings of Congress lack a rational basis when applied to personal use drug crimes, unless *Wickard v. Filburn* is to be extended to all illegal activities instead of just economic activities, something *Lopez* and *Wirtz* indicates that the Court will not do.

a. Congress's findings are not entitled to complete deference under *Lopez* and other cases.

As the Court of Appeals noted, Congress made findings of the interstate effect of possession of controlled substances. 21 U.S.C. § 801, quoted *supra,* at 15-16, and in full in App. D. (App.A, at 6a).

Congress *did not,* however, find that there was a "substantial relation" as required by *Lopez,* and, even if it had, Congress's findings that there was a substantial interstate effect were not entitled to deference in light of the strained relation between the premise it was seeking to support and reality. *Lopez,* 514 U.S. at 563-65. "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* at 564.

Lopez quoted from *McCulloch v. Maryland,* 4 Wheat. 316 (1819):

> Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

Id. at 405 (quoted in *Lopez,* 514 U.S. at 566).

Thus, the *Lopez* Court held that

> [t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and

there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. *See supra,* at 557-558. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, *cf. Gibbons v. Ogden, supra,* at 195, and that there never will be a distinction between what is truly national and what is truly local, *cf. Jones & Laughlin Steel, supra,* at 30. This we are unwilling to do.

Lopez, 514 U.S. at 567-68.

This applies with equal force to petitioner's conduct.

b. Where and what is the interstate effect here?

The gun in *Lopez* undoubtedly moved in interstate commerce before it was bought in Texas, just as the ingredients for the petitioner's methamphetamine lab likely moved in interstate commerce before they got to Pine Bluff. But, that is it, but that is not enough.

The activity itself has to have a "substantial relation" to or a "substantial affect on interstate commerce." If petitioner's methamphetamine lab has a "substantial affect on interstate commerce," then the same logic supports the conclu-

sion that a 17 year-old growing a marijuana plant under a light in his bedroom closet or passing a joint to a friend or taking a parent's Valium is committing a federal crime. Under the government's theory, those examples are federal crimes, too; only the government usually chooses not to get involved with such cases, then only as a matter of allocating federal resources and not as a matter of federal jurisdiction.

The record here is devoid of any evidence of any remote possibility that the methamphetamine produced in this lab would be sold or given away; *i.e.,* move in commerce, let alone interstate commerce. For all we know, it was going to be used by petitioner and his cohort alone. Where is the effect on interstate commerce by that?

c. 21 U.S.C. § 801(2-6) was adopted with *Wickard v. Filburn* in mind, but that is not enough because this is not economic activity and there is no rational basis for the conclusion drawn.

The Congressional findings of 21 U.S.C. § 801(2-6) was obviously adopted with *Wickard v. Filburn,* 317 U.S. 111 (1942), in mind. That case permitted federal regulation of what wheat a farmer would use on his own land for his own purposes, because, combined with similarly situated persons, it would effect what was available on the open market. Thus, Congress may regulate activity that "exerts a substantial economic effect on interstate commerce." *Id.* at 125.

Since then, the Court has made clear that "a rational basis [must] exist[ ] for concluding that a regulated activity sufficiently affected interstate commerce," and "'the power to regulate commerce, though broad indeed, has limits' that '[t]he Court has ample power' to enforce." *Lopez,* 514 U.S. at 557 (bracketed material added), quoting, *inter alia, Maryland v. Wirtz,* 392 U.S. 183, 196 (1968).

> "[N]either [in *Wirtz*] nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," [*Wirtz,*] at 197 n. 27. Rather, "[t]he Court has said only that where a *general regulatory statute bears a substantial relation to commerce,* the *de minimus* character of individual instances arising under that statute is of no consequence." *Ibid.* (first emphasis added)

Lopez, 514 U.S. at 558 (bracketed reference to *Wirtz* added).

As stated before, there is no evidence whatsoever that petitioner's methamphetamine would be used in commerce. It was like the wheat in *Wickard*—it wasn't going anywhere. But, at least wheat in *Wickard* could be legally bought and sold, and the government regulated levels of production in response to the Great Depression. Here, for what it is worth, the state governments already *prohibited* all production of methamphetamine. There is no regulation of commerce. Indeed, it is a prohibition of commerce.

And that is just the point: This case does not involve commerce, let alone interstate commerce, to prohibit or regulate.

3. *Morrison* and *Jones*

In one week in May 2000, the Supreme Court followed *Lopez* in striking down as an excess of Congress's powers for lack of a substantial relation to interstate commerce: part of the Violence Against Women Act of 1995, 42 U.S.C. § 13981, providing for a federal civil action against rapists, *United States v. Morrison,* 529 U.S. 598 (2000), and the federal arson statute as applied to a home, 18 U.S.C. § 844(i); *Jones v. United States,* 529 U.S. 848 (2000).

In *Morrison,* there was no connection between the violent crime of rape and interstate commerce. Congress sought to

make a state crime a federal civil cause of action as a new form of civil rights case. The Court reiterated that legislation passed under the Commerce Clause "is not without effective bounds." *Id.* at 608 (citing *Lopez,* 514 U.S. at 557).

> In *Jones & Laughlin Steel,* the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

Morrison, 529 U.S. at 608 (quoting *Lopez,* 514 U.S. at 556-57 (quoting *NLRB v. Jones & Laughlin Steel,* 301 U.S. 1, 37 (1937))).

> With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature. *See, e.g., id.,* at 559-560, and the cases cited therein.
>
> Like the Gun-Free School Zones Act at issue in *Lopez,* § 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce, Congress elected to case § 13981's rem-

> edy over a wide, and more purely intrastate, body of violent crime.

Morrison, 529 U.S. at 613.

In *Jones,* there was at least a tenuous argument to be made that the home had some interstate commerce connection because it was connected to utilities that moved in interstate commerce, the mortgage was held by a company out-of-state, and the home was insured by an out-of-state insurer. But, this was not enough because the interstate commerce connection had to be "substantial," and it was not. The Court distinguished *Russell v. United States,* 471 U.S. 858 (1985), where it sustained the statute as applied to a dwelling rented to others for economic gain. "The proper inquiry, we agree, 'is into the function of the building itself, and then a determination of whether that function affects interstate commerce.' . . ." *Jones,* 529 U.S. at 854-55.

The arson statute in *Jones* applied to "any building" "used" in an activity effecting interstate commerce. Accordingly, it had to be limited to commercial buildings to be constitutional. *Id.* at 855. The Court noted that if it adopted the Government's reasoning, any building short of a shack on rural land without utilities would be covered. *Id.* at 856-57. "To read § 844(i) as encompassing the arson of an owner-occupied private home would effect such a change, for arson is a paradigmatic common-law state crime." *Id.* at 858.

The Court did not, however, strike down 18 U.S.C. § 844 (i) in *Jones*. Rather, it held that the lack of a true effect on interstate commerce removed Jones's private home from the ambit of the statute.

4. There is no substantial relation to interstate commerce from a small methamphetamine lab making drugs for personal use; it is not "economic activity" because they were only hurting themselves

This methamphetamine lab and its product are no different than the building involved in *Jones* or the gun involved in *Lopez*. Indeed, arson for the insurance proceeds is far closer to being an economic crime than petitioner making his own methamphetamine. There is no substantial relation to interstate commerce because it was all for personal use. Petitioner and his cohort were harming no one but themselves. Thus, it is a paradigmatic state crime with no economic impact.

While Roscoe Filburn's wheat was kept off the market, it potentially had an effect on the price of wheat elsewhere because it affected what he would buy, too. *Wickard*, 317 U.S. at 128, quoted in *Lopez*, 514 U.S. at 560. That is economic activity. It is a given.

Where, however, is the economic activity involved in this methamphetamine case? The Court of Appeals never explains. (App.A at 6a-7a) It simply follows Congress and declares this to be interstate commerce without analyzing any of the facts and circumstances. Under *Wirtz*, *Lopez*, and *Morrison*, Congress's actions are not without bounds.

H. Congress can easily remedy the situation by adding an interstate commerce element.

All Congress has to do is pass an amendment to the CSA adding an interstate commerce element to the crime, something all federal drug laws had prior to 1970. It would be something for the government to prove in every case, which should not be difficult where there is a true interstate commerce interest, such as importation of drugs (already separately criminalized) or carrying or conspiring to carry drugs

across state lines. In cocaine cases, for example, that could be satisfied by a DEA agent testifying that all cocaine comes from South America. That much is required to assure a federal interest. *See Lopez,* quoted at page 20-21, *supra.*

Some would say that siding with petitioner on this issue will throw the drug prosecution machinery of the federal government into chaos. Petitioner disagrees. The government is obliged to prove an interstate commerce connection virtually everywhere else in the federal criminal code,[25] so why not here?

First, Congress can remedy the situation with an immediate amendment to the CSA adding an interstate commerce requirement which is an element of proof, something required by *Lopez, Morrison,* and *Jones.* Second, the federal government can prosecute the crimes it was intended to and should allocate its resources to, and not every petty drug crime it chooses.

Yes, this might create some legal uncertainty for a little while, but "legal uncertainty" is a necessary byproduct of the pact made for us in 1789 when we adopted the Constitution and 1791 when we adopted the Tenth Amendment. "Any possible benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers." *Lopez,* 514 U.S. 566.

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[25] But not all. *See, e.g.,* 18 U.S.C. §§ 35 (criminalizing drive-by shootings in a "major drug offense"; subject to the death penalty if a death results) & 521 (criminalizing being a part of a street gang), both having a federal drug law violation as a predicate act. *See* 21 U.S.C. § 848 (death during drug continuing criminal enterprise subject to death penalty).

The federal domestic violence statute at least has an interstate commerce element. 18 U.S.C. § 2261.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A, *United States v. Davis,* 288 F.3d 359 (8th Cir. 2002) 3a
Appendix B, *United States v. Davis,* No. 4:00CR00224 (E.D.Ark., June 26, 2001), order denying motion to dismiss 8a
Appendix C, *United States v. Davis,* No. 4:00CR00224 (E.D. Ark., Nov. 8, 2000), indictment 12a
Appendix D, 21 U.S.C. § 801 ..... 14a

APPENDIX A

288 F.3d 359

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3577

United States of America, Appellee,	*	
	*	Appeal from the United
v.	*	States District Court for the
	*	Eastern District of Arkansas.
Horace Andrew Davis, Jr., Appellant.	*	

Submitted: April 16, 2002
Filed: May 3, 2002

Before WOLLMAN, LOKEN, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Under an agreement preserving certain rights of appeal, Horace Andrew Davis, Jr. pled guilty to charges of attempting to manufacture methamphetamine, 21 U.S.C. §§ 841(a)(1), 846, possession of a firearm in relation to a drug offense, 18 U.S.C. § 924(c)(1), and possession of methamphetamine, 21

U.S.C. § 844(a). The district court[1] sentenced him to 138 months, and he raises two issues on appeal. Davis contends that the Controlled Substances Act is an unconstitutional assertion of federal jurisdiction and that his motion to suppress should have been granted. We affirm.

Police officers in Pine Bluff, Arkansas obtained an arrest warrant for Davis in April 1999 after his wife had called for assistance because of a domestic dispute. When Davis was apparently not located at the address listed in the warrant, officers began checking other places where they had been told he might be. They received information on May 3, 1999 that Davis was driving a red Jeep Cherokee, and they saw such a vehicle parked beside a camper trailer at one of the addresses they were checking. There was a separate road leading to the trailer which had a cable or rope stretched across it. Most of the officers waited behind that barrier while one approached the house on the property. The waiting officers noticed a burn pile near the trailer and ether cans with punched out bottoms, things they associated with the manufacture of methamphetamine. A woman at the house said Davis might be in the trailer, and he emerged from it.[2] When the officers moved to

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[1] The Honorable Susan Webber Wright, Chief Judge, United States District Court for the Eastern District of Arkansas.

[2] Testimony at the hearing in the district court differed about exactly where Davis was arrested. The officers testified that it took place by the trailer, but Davis said it was at the barrier across the road. Davis testified that he went down on horseback to meet the officers and that they were never near the trailer until after his arrest. His version of events contained a number of inconsistencies, and the district court found the police version more credible. We see no clear error in its findings. *United States v. Boyd,* 180 F.3d 967, 975 (8th Cir. 1999).

arrest him, they noticed a second burn pile and smelled ether. They walked behind the trailer where the odor was very strong and saw other items used in manufacturing methamphetamine. These included a gallon jug with liquid in it, coffee filters, an ice cooler under the trailer, and a liquid solution which appeared to be a "pill soak."[3] The officers contacted narcotics detectives who obtained a search warrant for the trailer. The subsequent search of the trailer revealed methamphetamine, marijuana, and a shotgun. The detectives also learned that Davis was living on the property with the permission of the owner of the house.

Davis was charged with attempting to manufacture methamphetamine, 21 U.S.C. §§ 841(a)(1), 846, possession of methamphetamine, § 844(a), and possession of a firearm in furtherance of a drug offense, 18 U.S.C. § 924(c)(1).[4] He moved to dismiss the indictment for lack of federal jurisdiction and to suppress the evidence found during the search of the trailer. After the district court denied both motions, he entered into a plea agreement under which he pled guilty while preserving his right to appeal the denial of his motions.

Davis contends that the court lacks jurisdiction because the Controlled Substances Act of 1970, Pub. L. 91-513 (codified at 21 U.S.C. § 801-904), exceeded the power given to Congress under the interstate commerce clause of the United States Constitution, Art. I, § 8, cl. 3. He argues an intrastate drug crime such as the manufacture of homemade methamphetamine does not substantially affect interstate commerce and cites in support *United States v. Lopez,* 514 U.S. 549, 559

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[3] According to the record, a pill soak is used to extract pseudoephedrine from pills like ephedrine for the manufacture of crystal methamphetamine.

[4] Davis was also charged with several similar offenses relating to incidents occurring after the search on May 3; those charges were dropped when Davis pled guilty in this case.

(1995). His methamphetamine related convictions are based on statutory sections within the Controlled Substances Act, see 21 U.S.C. § 841, 844(a), 846, and his conviction for possession of a firearm in relation to a drug offense is derivative. It appears he challenges jurisdiction on all counts.

We rejected a similar argument in *United States v. Patterson,* 140 F.3d 767, 772 (8th Cir. 1998), where we held that Congress may regulate both intrastate and interstate drug trafficking under its commerce clause powers because of the effect that intrastate drug activity has upon interstate commerce. The findings which Congress made in enacting the Controlled Substances Act, 21 U.S.C. § 801(2)-(6), demonstrate that local manufacture and distribution of controlled substances substantially affect interstate traffic in those substances, *United States v. Bell,* 90 F.3d 318, 321 (8th Cir. 1996). Unlike the statute at issue in *Lopez* which lacked such findings, 514 U.S. at 562, the Controlled Substances Act is a valid exercise of Congressional power under the commerce clause. *Patterson,* 140 F.3d at 772. Every other circuit to address the constitutional issue is in agreement. *See United States v. Brown,* 276 F.3d 211, 215 (6th Cir. 2002) (citing the cases).

Davis relies on cases where federal regulation over intrastate activity could not be justified under the commerce clause, *United States v. Morrison,* 529 U.S. 598 (2000) (provision of the Violence Against Women Act of 1995), and *Jones v. United States,* 529 U.S. 848 (2000) (limiting the reach of the federal arson statute). The activities which were targeted in those cases were unlike drug manufacture and distribution, however, because they were not economic endeavors. *See Morrison,* 529 U.S. at 611 ("federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce [requires] the activity in question [to be] some sort of economic endeavor.") Since Congress acted within its commerce clause authority in enacting the Controlled Substances Act, there is federal jurisdiction over Davis' offenses

and the district court did not err by denying the motion to dismiss.

Davis also contends that his suppression motion should have been granted because the officers were not lawfully in place to see the evidence of methamphetamine manufacturing which led to the search warrant. He argues that their intrusion onto the property and his subsequent arrest were unlawful because they did not have a reasonable belief that he lived at that location. We review the facts supporting the denial of a motion to suppress for clear error and review legal conclusions de novo. *United States v. Boyd,* 180 F.3d 967, 975 (8th Cir. 1999). Absent exigent circumstances or consent, an arrest warrant does not justify entry into a third person's home to search for the subject of the arrest warrant. *United States v. Risse,* 83 F.3d 212, 215 (8th Cir. 1996) (citing *Steagold v. United States,* 451 U.S. 204, 215-16 (1981)). A valid arrest warrant does, however, give police officers authority to enter the place where a suspect lives in order to execute the warrant. *Risse,* 83 F.3d at 215 (citing *Payton v. New York,* 445 U.S. 573, 602-03 (1980)). Since Davis was living at the trailer property, the warrant for his arrest permitted officers to execute the warrant at that location. Even had he not lived there, the officers would have had authority to cross the property to arrest him based on the consensual conversation with the woman at the house and the fact that they saw him standing outside of the trailer. Based on their observation of what was in plain view, they then contacted narcotics officers who used the information to seek a search warrant. The officers obtained and executed warrants and did not violate Davis' Fourth Amendment rights.

Accordingly, we affirm the judgment of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

FILED
Nov. 8, 2000

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA

VS. NO. 4:00CR00240-01 SWW

HORACE ANDREW DAVIS, JR.

ORDER

Now before the Court is defendant's motion to dismiss for lack of federal jurisdiction and to dismiss for lack of element in indictment [docket no. 20, 22] as well as the government's response [docket no. 24]. For the reasons stated below, the Court hereby determines that defendant's motion should be denied.

Defendant argues that Congress lacks the power to criminalize possession of controlled substances where there is no interstate commerce connection, citing *United States v. Lopez,* 514 U.S. 549 (1995). However, the Eighth Circuit addressed exactly this type of legal challenge in *United States v. Patterson*:

> Patterson contends on appeal that § 401(a)(1) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 841(a)(1), is unconstitutional. He argues that Congress does not have the authority under the Commerce Clause to regulate the manufacture and distribution of controlled sub-

> stances because these activities do not substantially affect interstate commerce. This argument lacks merit. Our circuit has held that interstate drug activity affects interstate commerce and that Congress may regulate both intrastate and interstate drug trafficking under the Commerce Clause. In particular, section 841(a)(1) is a valid exercise of the Commerce Power under *Lopez*.

United States v. Patterson, 140 F.3d 767, 722 (1998) (internal citations omitted); *see also United States v. Bell*, 90 F.3d 318, 321 (1996) (discussing Congress' explicit findings as basis for holding Congress may regulate both interstate and intrastate drug trafficking under the Commerce Clause).

Defendant also cites *United States v. Morrison*, 529 U.S. 598 (2000), *Jones v. United States*, 529 U.S. 598 (2000), and *United States v. Oakland Cannabis Buyer's Coop.*, 121 S. Ct. 1711 (2000), in support of his argument that the Controlled Substances Act is unconstitutional. However, footnote 7 of the *Oakland* opinion, quoted by defendant in his supplemental motion, makes clear that, despite holdings in *Morrison* and *Jones* limiting congress' Commerce Clause authority with regard to the statutes at issue in those cases, the Supreme Court has not so held with regard to the Controlled Substances act. *See Oakland*, 121 S. Ct. at 1720 n.7 ("Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause."). While this Court acknowledges these recent limitations, neither *Jones* nor *Morrison* are sufficiently obvious or clear on this issue to permit this Court to deviate from existing precedent finding the Controlled Substances Act constitutional. Therefore, in light of *Patterson* and *Oakland*, this Court will not dismiss the charges in the indictment for lack of jurisdiction.

Defendant also moves to dismiss arguing that there is no element of proof in the indictment of an interstate commerce

connection, and that the interstate commerce connection is an element of the crime which must be provided by the government beyond a reasonable doubt. To be sufficient, an indictment must set forth the essential elements of the offense. As stated by the Supreme Court:

> It is generally sufficient that the indictment set forth the offense in the words of the statute itself, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished."

Hamling v. United States, 418 U.S. 87, 117 (1974) (internal citation omitted). The indictment in this matter tracks the language of the pertinent statutes, and the statutes and jury instructions for these charged crimes contain no "interstate commerce connection" element. *See* 21 U.S.C. § 841(a)(1), 21 U.S.C. § 844(a), 21 U.S.C. § 846, 18 U.S.C. § 924(c)(1)(A); Eighth Circuit Model Jury Instructions-Criminal: Instruction Nos. 6.18.841A, 6.18.841B, 6.18.924C. *See also, e.g., United States v. Perkins*, 94 F.3d 429 (8th Cir. 1996) (essential elements under 21 U.S.C. § 841(a)(1)). Defendant cites no specific authority in support of his proposition that the "interstate commerce connection" constitutes an element of the charged crimes. Further, as previously stated, circuit precedent establishes Congress' criminalization of wholly *intrastate* drug activity as constitutional; therefore, logically, an *interstate* connection cannot be a require *element* of the crime. *Compare also United States v. Beck*, 250 F.3d 1163 (8th Cir. 2001) (noting that the nexus with interstate commerce is an essential element of 18 U.S.C. § 844(i), where that statute provides: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real personal property used in interstate or foreign commerce... shall be imprisoned....").

Accordingly, this Court will not dismiss the indictment because no element is lacking from that indictment.

THEREFORE, defendant's motion to dismiss for lack of federal jurisdiction and to dismiss for lack of element in indictment [docket no. 20, 22] is hereby DENIED.

IT IS SO ORDERED THIS 26th DAY OF JUNE, 2001.

/s/ Susan Webber Wright
U.S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA	) No. 4:00CR00240
	) 21 USC § 841(a)(1)
v.	) 21 USC § 844(a)
	) 21 USC § 846
HORACE ANDREW DAVIS, JR.	)18 USC § 924(c)(1)(A)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

On or about May 3, 1999, in the Eastern District of Arkansas, HORACE ANDREW DAVIS, JR., did knowingly and intentionally attempt to manufacture methamphetamine, a Schedule II controlled substance, thereby violating the provisions of Title 21, United States Code, Sections 841(a)(1) and 846.

COUNT TWO

On or about May 3, 1999, in the Eastern District of Arkansas, HORACE ANDREW DAVIS, JR., during, in relation to and in furtherance of the drug trafficking crime alleged in count one of this indictment, did knowingly and intentionally possess a firearm, to wit; a .12 gauge Mossberg shotgun, thereby violating the provisions of Title 18, United States Code, Section 924(c)(1)(A).

COUNT THREE

On or about May 3, 1999, in the Eastern District of Arkansas, HORACE ANDREW DAVIS, JR., did knowingly and intentionally possess methamphetamine, a Schedule II

controlled substance, thereby violating the provisions of Title 21, United States Code, Sections 844(a).

COUNT FOUR

On or about May 3, 1999, in the Eastern District of Arkansas, HORACE ANDREW DAVIS, JR., did knowingly and intentionally possess marijuana, a Schedule I controlled substance, thereby violating the provisions of Title 21, United States Code, Sections 844(a).

[Counts 4-11dismissed on conditional plea. They were similar charges under same statutes occurring on May 25, 2000 and October 1, 2000.]

A TRUE BILL

/s/ [signature of foreperson]
FOREPERSON

PAULA J. CASEY
United States Attorney

/s/ Robert J. Govar
UNITED STATES ATTORNEY/ASSISTANT

ROBERT J. GOVAR
Senior Litigation Counsel
P.O. Box 1229
Little Rock, Arkansas 72203
501-324-6583

APPENDIX D

21 U.S.C. § 801

The Congress makes the following findings and declarations:

(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.

(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.

(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—

(A) after manufacture, many controlled substances are transported in interstate commerce,

(B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and

(C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.

(4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.

(5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and

controlled substances manufactured and distributed intrastate.

(6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.

(7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.